

THE HONORABLE RICHARD A. JONES

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ROBERT ANDRE FRAZIER,

Defendant.

No. CR16-00033-RAJ

DEFENDANT’S MOTION TO DISMISS
FOR VIOLATION OF BRADY V.
MARYLAND AND GOVERNMENT
MISCONDUCT

ORAL ARGUMENT REQUESTED

I. RELIEF REQUESTED

Defendant Robert Frazier, by and through his attorneys Lee Covell and Emily M. Gause, ask this Court to dismiss the indictment for a flagrant violation of Brady v. Maryland and government misconduct in failing to disclose exculpatory evidence known to the Government since November 9, 2015 that was willfully suppressed from the defendant until the day before his suppression hearing (July 22, 2016). Such misconduct cannot be tolerated.

II. RELEVANT FACTS

Mr. Frazier was arraigned on one count of Felon in Possession of a Firearm on February 16, 2016. At that time, defense counsel requested discovery pursuant to local rules. Local Rule 16 requires the Government to provide “evidence favorable to the defendant and material to the defendant’s guilt or punishment to which he is entitled to pursuant to Brady v. Maryland and United States v. Agurs.” The currently assigned

1 Assistant United States Attorney has been assigned to this case from arraignment, for the
2 past five months.

3 Prior to today, defense was aware that there was a confidential informant (CI)
4 which provided the sole basis to begin investigating Mr. Frazier. All incriminating
5 information was solely provided by this confidential informant, as law enforcement merely
6 corroborated innocuous facts when they observed Mr. Frazier at a motel for one hour on
7 one day prior to their decision to arrest and search Mr. Frazier. Mr. Frazier challenged the
8 CI's information and veracity by way of his motion to suppress filed on June 22, 2016.
9 That motion is scheduled to be argued on Monday, July 25, 2016 at 9:00 a.m.

10 Defense counsel has requested contemporaneous notes or other documentation of
11 CCO Rongen's interactions with the CI because the only summary of his discussions with
12 the CI is found in his November 18, 2015 report written *after* Mr. Frazier's arrest and the
13 search of a third-party's vehicle. The Government has not provided any materials
14 responding to the defense request to date.

15 Today, Friday, July 22, 2016, at 11:25 a.m., defense counsel received an email
16 disclosing for the first time that the confidential informant failed a polygraph around the
17 same time that he was providing information about Mr. Frazier to CCO Rongen. Exhibit
18 A. The Government also informed defense counsel that it was adding two Government
19 witnesses for the suppression hearing scheduled for the following day. Ex. A. There is no
20 reference to either witness in all of Mr. Frazier's discovery. Mr. Frazier was completely
21 unaware that either of these two witnesses were in anyway involved in his case until the
22 (business) day before his suppression hearing.

23 Apparently, and conveniently, one of these witnesses will provide hearsay
24 information about what the confidential informant told CCO Rongen on November 6,
2016. This witness, CCO Leslie O'Connor, is not mentioned once in Mr. Frazier's DOC
chronos. This witness is also not mentioned in CCO Rongen's report. There is no report
or document provided to defense authored by CCO O'Connor. Instead, this witness is
expected to testify based on her personal knowledge and memory from eight months ago
about a conversation she overheard between CCO Rongen and the confidential informant.

Another witness disclosed to defense just one day prior the suppression hearing is
CCO Patricia Turner, also not mentioned once in all of Mr. Frazier's DOC records. She is

1 expected to testify that the CI failed a polygraph that was taken *during the time* that the CI
 2 was providing information about Mr. Frazier. Ex. A. Defense does not have any further
 3 information about the polygraph or any report from CCO Turner.

4 A subsequent email sent today, Friday, July 22, 2016, at 2:45 p.m., one day prior
 5 the suppression hearing, further discloses that the CI took the polygraph on *November 6*,
 6 the same exact day he first provided information about Mr. Frazier to DOC. Ex. B. Further,
 7 the results of that polygraph were received on *November 9*, and *still* CCO Rongen
 8 continued to use the CI as his sole basis for developing reasonable cause to find Mr. Frazier
 9 in violation of his DOC conditions. A subsequent meeting between CCO Rongen and the
 10 CI on November 15 is the first time that CCO Rongen allegedly learns that Mr. Frazier is
 11 “staying” at the Star Motel and might be in possession of a firearm.

12 The defense is still waiting for subsequent information regarding these disclosures.
 13 The Government advises more information is coming.

14 **III. ARGUMENT**

15 As the United States Supreme Court stated in Brady v. Maryland, “the suppression
 16 by the prosecution of evidence favorable to an accused... violated due process ...
 17 irrespective of the good faith or bad faith of the prosecution.” 373 U.S. 83, 87, 83 S.Ct.
 18 1194, 1196-1197, 10 L.Ed.2d 215 (1963). The Due Process Clause of the Fourteenth
 19 Amendment to the United States Constitution requires the Government to reveal any
 20 information it actually or constructively possesses and which information is favorable to
 21 the defendant and material to the issue of guilt or punishment, or in any way discredits the
 22 Government’s case. Brady v. Maryland, 373 U.S. 83, 87 (1963). Favorable evidence under
 23 Brady includes not only exculpatory evidence but also impeachment evidence. Giglio v.
 24 United States, 405 U.S. 150, 154–55, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). Due process
 requires disclosure of any evidence that provides grounds for the defense to attack the
 reliability, thoroughness, and good faith of the police investigation, to impeach the
 credibility of the state’s witnesses, or to bolster the defense case against prosecutorial
 attacks. Kyles v. Whitley, 514 U.S. 419, 437, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995).

Brady obligations extend not only to evidence requested by the defense but also to
 favorable evidence not specifically requested by the defense. United States v. Agurs, 427
 U.S. 97, 110, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976). Although the Brady rule often is

1 phrased in terms of information “known to the prosecution,” the prosecution’s
 2 “knowledge” for this purpose clearly extends beyond the personal knowledge of the
 3 prosecuting attorney representing the Government at trial. Giglio v. United States, 405
 4 U.S. 150, 154 (1972). The government must not only disclose evidence possessed by
 5 prosecutors but also evidence possessed by law enforcement as well. Kyles at 437. “The
 6 individual prosecutor has a duty to learn of any favorable evidence known to others acting
 7 on the government’s behalf in the case, including the police.” Kyles v. Whitley, 514 U.S.
 8 419, 437 (1995). “Brady obligations include not only evidence in the prosecutor’s file but
 9 also include evidence in the possession of the police and others working on the
 10 Government’s behalf.” Kyles, 514 U.S. at 438, 115 S.Ct. 1555. The Government must
 resolve doubts regarding disclosure in favor of sharing the evidence with the defense.
Giglio at 154. Further, the Government has a *continuing duty* to disclose discoverable
 information in a criminal prosecution. Id.

11 To establish a Brady violation, a constitutional due process violation warranting
 12 dismissal, a defendant must demonstrate the existence of each of three elements: “(1) The
 13 evidence at issue must be favorable to the accused, either because it is exculpatory, or
 14 because it is impeaching; (2) that evidence must have been suppressed by the Government,
 15 either willfully or inadvertently; and (3) prejudice must have ensued.” Strickler v. Greene,
 16 527 U.S. 263, 281–82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999) (emphasis added). As
 17 courts conduct an analysis under Brady, they consider not only its discrete elements but its
 animating purpose as well: “The animating purpose of Brady is to preserve the fairness of
 criminal trials.” Morris v. Ylst, 447 F.3d 735, 742 (9th Cir. 2006) (citing Brady, 373 U.S.
 at 87, 83 S.Ct. 1194).

18 This indictment should be dismissed because the Government sat on material
 19 impeaching evidence for eight months without ever disclosing it to defense. This Court
 20 does not need to find that the Government acted in bad faith to find a Brady violation. Yet,
 21 it does appear that CCO Rongen, an agent acting on behalf of the Government in Mr.
 Frazier’s case, did act in bad faith when he failed to disclose the material impeaching
 22 evidence for his star witness who provided the sole basis for beginning an investigation
 into Mr. Frazier. CCO Rongen knew on November 9, 2015 that his CI had failed a
 23 polygraph. “The personal responsibility [of a prosecutor] cannot be evaded by claiming
 24

1 lack of control over the files or procedures of other executive branch agencies.” United
 2 States v. Jennings, 960 F.2d 1488, 1490-1491 (9th Cir. 1992); *See also* United States v.
 3 Henthorn, 931 F.2d 29, 30 (9th Cir. 1991); United States v.. Cadet, 727 F.2d 1453, 1467
 (9th Cir. 1984).

4 As the United States Supreme Court stated in Brady v. Maryland, “the suppression
 5 by the prosecution of evidence favorable to an accused... violated due process ...
 6 irrespective of the good faith or bad faith of the prosecution.” 373 U.S. 83, 87, 83 S.Ct.
 7 1194, 1196-1197, 10 L.Ed.2d 215 (1963). The Government had a duty under Local Rule
 8 16 and Brady v. Maryland to disclose all information that was material to Mr. Frazier’s
 9 case. By withholding material impeachment evidence, the Government violated its duty
 10 to disclose under Brady v. Maryland. Although dismissal is a severe sanction, it will put
 11 the Government on future notice that this type of behavior is not to be tolerated in a system
 12 that must recognize the due process rights of all accused persons who come before it. Mr.
 13 Frazier’s rights have been substantially prejudiced in that he must now choose between his
 14 right to a fair trial with effective assistance of counsel or his right to a speedy trial. The
 15 Government became aware that the veracity of the Confidential Informant (CI) was being
 16 challenged by defense on June 29, 2016 when defense filed a motion to suppress in this
 case. Now, a month later, we have a late disclosure the day before Mr. Frazier’s
 suppression hearing that is directly material to the suppression issues and impeaches the
 CI. Waiting until the very last minute to dump material information on the defense is
 government misconduct.

17 **IV. CONCLUSION**

18 *“There is an epidemic of Brady violations abroad in the land, only judges
 can put a stop to it.”*

19 United States v. Olsen, 737 F.3d 625 (9th Cir. 2013) (Chief Judge Kozinski,
 20 dissenting).

21 For the reasons stated above, Mr. Frazier urges this Court to dismiss the indictment
 22 for flagrant violation of Brady v. Maryland, finding prejudice to Mr. Frazier’s right to
 23 effective assistance of counsel or forcing him to waive his right to speedy trial, and
 24 government misconduct warranting dismissal.

1 DATED this 22nd day of July, 2016.

2 Respectfully submitted,

3 s/ Emily M. Gause

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17 CERTIFICATE OF SERVICE

18 I hereby certify that on this day, I electronically filed Defendant Robert Andre
19 Frazier's Motion to Dismiss for Violation of Brady v. Maryland and Government
20 Misconduct with the clerk of the court using the CM/ECF system which will send
21 notification of such filing to all parties of record.

22 Dated this 22nd day of July, 2016.

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